on such a point may differ, but it is the opinion of the Registrar (or Assistant Registrar) that the law provides shall count unless, as I have said before, he can be shown to have made some obvious error, or to have exercised his discretion in that regard capriciously or mischievously, or simply to have followed some one else's advice or instructions and not to have exercised any discretion at all. A reference to Order 65, rule 27 (44, 45 and 48) of the Rules of the English Supreme Court will serve to mitigate any disappointment that may be felt at the rejection of this appeal.

Appeal dismissed.

In re S.N.V.S.M. LETCHUMANAN CHETTY

Ex parte R.M.K.R.V. FIRM

[O.C.J. (de Buriatte J.) October 12, 1936]
[Perak Bankruptcy No. 15 of 1936]

Enforcement of Bankruptcy Orders — Set-off — Civil Procedure Code (Cap. 7), ss.92(ii), 253, 262 and 343 and Bankruptcy, r.67.

The *R.* firm had obtained a decree for $3,821.69, interest and costs against *L.* in Kuala Lumpur in 1932, which, being unsatisfied, had been sent to Ipoh for execution. The *R.* firm took bankruptcy proceedings against *L.*, which were dismissed with costs. When the costs were taxed, the *R.* firm applied for execution by set-off of the costs, which amounted to $946.75, against their decree, and *L.* issued a judgment debtor summons on the managing partner of the *R.* firm. The Registrar adjourned the application for execution to the Judge and the application and summons were heard together.

Held: following *Re Chong Fong Sen; ex parte Phuman Singh,* [1931-32] F.M.S.L.R. 340; [1932] 1 M.L.J. 140, that the set-off should be allowed, and the judgment debtor summons was therefore bad.

F. A. Briggs (*G. Terrell* with him) for the R.M.K.R.V. Firm:

The application for execution is *ex parte,* but affects the validity of the judgment debtor summons. The bankruptcy order and allocatur are together enforceable as a "judgment" Bankruptcy Rule 67. This rule is copied from English Bankruptcy Rule 91 and "judgment" has its English meaning. It is for this purpose the equivalent of a decree under the Civil Procedure Code, sections 2 and 216 to 221. Judicature Act, 1925, section 225. *L.* has correctly treated his order as a decree by taking out a judgment debtor summons under section 343, Civil Procedure Code. The bankruptcy order is therefore subject to set-off under section 262 of the Civil Procedure Code as if it were a cross decree. The judgment debtor summons is an application for execution and the conditions of section 262 are fulfilled; but where it is sought to obtain set-off an application by the holder of the smaller decree is not in any event necessary. The section is mandatory. It overrides rights of third parties in the bankruptcy order. *Re Chong Fong Sen, supra,* shows that the English rules as to set-off in bankruptcy matters do not apply in this country. The Court here is sitting both in bankruptcy and in its ordinary civil jurisdiction.

B. K. Das for S.N.V.S.M. Letchumanan Chetty. Section 262 is applicable only where there are two suits. The bankruptcy proceeding is not a suit. The judgment debtor summons is not an application for execution, which can only be made under section 253 of the Civil Procedure Code. The absenceof such application renders section 262 inapplicable. The judgment debtor summons, although issued under section 343, is a proceeding in bankruptcy and the decrees are not in the same Court for the purposes of set-off. English authorities show that the rule against set-off is based in part on the rights of solicitors to a lien: *Re Adams* (1880) 14 Ch. D. 37; *Re Bassett* [1896] 1 Q.B. 219, and *Re Drummond,* [1909] 2 K.B. 622. No set-off is allowed on insolvency proceedings in India though the Civil Procedure Code applies. *Mulla* on Insolvency. Insolvency Rules 44 and 203. Section 92(ii) of the Civil Procedure Code shows that set-off is subject to solicitors' lien. Here there is an equitable lien, or an equitable right in the order.

[De Buriatte J. — Cases such as *Pringle* v. *Gloag* (1879) 10 Ch. D. 676 show that there may be an equitable set-off].

The solicitors' right is to be preferred. *Ex parte Wagner,* 2 F.M.S.L.R. 10. *Re Chong Fong Sen, supra,* was an application for equitable set-off. Here I have the better equity.

F. A. Briggs in reply.

De Buriatte J.: The Court is now sitting both in bankruptcy and in what I may loosely call its common law jurisdiction. Cases such as *Re Bassett, supra,* depend on the antagonistic relations obtaining before the Judicature Acts between the different superior Courts in England and their reluctance to give effect to one another's orders. They are therefore inapplicable in this country, though in England they were saved by the provision of the Judicature Acts that the old practice should continue in force, unless expressly altered. The bankruptcy order, with the allocatur made thereunder, is for all purposes of its enforcement to be considered as equivalent to a decree. There are therefore two decrees capable of execution in the same Court at the same time. I am of opinion that the decision in *Re Chong Fong Sen, supra,* was right and shall follow it. The R.M.K.R.V. firm's application for execution by setting off under section [281] 262 of the Civil Procedure Code the monies due by the firm to Letchumanan under the bankruptcy order and allocatur will be allowed. Satisfaction will be entered upon the bankruptcy order and allocatur. It follows that there is then no unsatisfied decree upon which the judgment debtor summons could issue, and it is therefore bad and will be struck out. Costs must follow the event. [281]

Order accordingly.

FOO YIN FONG & ANOR. v. YEW CHEE SEONG

[C.A. (Terrell Ag. C.J., Whitley Ag. C.J. (S.S.) and Aitken J.) September 9, 1936]
[Perak Civil Appeal No. 10 of 1936]

Mining Enactment (Cap. 147), s.97 — Powers of Warden to cancel sub-lease — Effect of Tin and Tin-ore (Restriction) Enactment (Cap. 95) on such powers.

Although the powers of the Warden of Mines under section 97 of the Mining Enactment (Cap. 147) have been necessarily modified by the coming into force of the Tin and Tin-ore (Restriction) Enactment (Cap. 95) the Warden's discretionary power to cancel sub-leases under and in accordance with the provisions of that section still survives.

But, in exercising such power the Warden must exercise his discretion in the way prescribed by that section and not otherwise. He has no power to construe collateral agreements made between the parties outside the terms of the sub-lease. If such parties wish to have the terms of such collateral agreements adjudicated upon, their proper remedy is to institute civil proceedings.

S. Seenivasagam, John L. Woods and *K. C. Chan* for the plaintiffs-appellants.

Roland Braddell and *J. Dunford Wood* for the defendant-respondent.

The facts sufficiently appear from the judgment of Terrell Acting C.J.

Cur. Adv. Vult.

Terrell Ag. C.J.: By a sub-lease No. 19/30 dated the 23rd of July, 1930, the Societe des Etains de Bayas Tudjoh sub-leased to one Foo Nyit Tse the mining lands at Chendriang therein described. By a sub-sub-lease dated the 3st July, 1930, Foo Nyit Tse sub-sub-leased the same lands to the respondent. Both documents are in the statutory form, the only difference between them being that in the original sub-lease the tribute was 10 per cent. and in the sub-sub-lease 12 per cent. The appellants are the representatives of Foo Nyit Tse who has since died.

By section 36 of the Mining Enactment a sub-lease (which includes a sub-sub-lease) must be substantially in the form in Schedule X. In accordance with this provision the sub-lease in favour of the respondent included the following clause numbered 8:—

"That this sub-lease shall be liable to cancellation at any time at the discretion of the Warden or the Court upon proof:

(i) that the sub-lessee has failed to pay to the sub-lessor the amount of any moneys which he is by the terms of this sub-lease bound to pay for a period of three weeks from the date at which such payment became due;

(ii) that the sub-lessee has not worked the land in accordance with clause 4 of this sub-lease or has by his default rendered the land liable to forfeiture under the Mining Enactment, 1928;

(iii) that the sub-lessee has not during a period of six months employed at least 100 labourers or labour saving apparatus equivalent thereto as prescribed in section 16(iii)(b) of 'The Mining Enactment, 1928' for not less than one month in mining the land."

The powers of the Warden with regard to cancellation are given by section 97(ii) of the Enactment. Since the Enactment of 1928 these powers have been discretionary; previous to that cancellation was obligatory if the provisions of the sub-section had not been complied with.

No difficulty arose until the Ti n and Tin-ore (Restriction) Enactment came into force on the 1st of March, 1931. As a result of that Enactment the amount of tin ore which could be extracted was regulated (a) by the assessment for the particular mining area, and (b) by the domestic quota allowed to Malaya. The latter has varied considerably, and the Court was informed that since the Enactment came into force, it has been as low as 28 per cent. It is obvious that in these circumstances it would have been unreasonable to insist upon a strict compliance with clause 8(iii) providing for the employment of 100 labourers, or labour saving apparatus equivalent thereto.

After discussions extending over several months, the parties modified their rights under the sub-lease by entering into an agreement which is dated the 11th October, 1932, and which dealt also with another sub-lease No. 25 of 1930 not the subject of these proproceedings. This agreement recites, *inter alia*, that it was found that with the introduction of tin restriction the terms and provisions in the sub-sub-leases were inadequate to deal with the new set of conditions thus brought about. The agreement provides (clause 1) that the tribute shall be 9½ per cent. [282] of the tin [282] ore sold under the Certificate of Production. Clause 2 is important, and provides that in the event of the quota being used for the sale of tin-ore produced elsewhere than from the lands comprised in the sub-leases, Foo Nyit Tse should have the option of taking his tribute at one-half the aforesaid rate, i.e. 4¾ per cent., on the total amount realised from sales of tin sold with the quota allotted in respect of the said lands.

By clause 7 the respondent agreed to group his Certificate of Production with Foo Nyit Tse's group or with others as Foo Nyit Tse might from time to time direct.

As the agreement was not registrable, clause 10 provided that Foo Nyit Tse should be entitled to lodge a caveat to protect his interests, and such caveat was duly lodged on the 15th October, 1932.

Clause 13 declares that the agreement shall be collateral to the sub-leases, and shall vary the terms thereof where the context so requires. With regard to this clause it is common ground that its provisions are inoperative, as no substantial deviation from the form in the Mining Enactment is permissible. Apart from this, however, the agreement may be binding as a contract *inter partes*, but not as otherwise affecting the registrable interest in the mining lands in question.

Now, with regard to the grouping of the certificates of production, this can only be effected with the permission of the Warden of Mines, under the provisions of the Rules made under the Tin and Tin-ore (Restriction) Enactment—(see p. 581 of the 1932 Enactments).

Under Rule 4(vii), with the permission of the Deputy Controller (i.e. the Warden of Mines) two or more producers may group their certificates of production and aggregate the quotas thereof.

Rule 4(viii) provides the machinery for the issue of the Certificate of Production when mines are grouped, and Rule 4(viii)(c), as amended in 1933, provides that the privileges as regards grouping shall terminate at the end of every quota period, but may be renewed at the discretion of the Deputy Controller.

It was not disputed that the Certificate of Production to which the respondent was entitled, was grouped with that of other mines. It was also not disputed that the Warden of Mines never approves of grouping arrangements without consulting the sub-lessors and all other interested in the mining lands in question and obtaining their consent.

Quite apart from this agreement of the 11th October, 1932, therefore, the Rules provided that a mine with a Certificate of Production was at liberty

to enter into a grouping arrangement which might result in no tin ore being produced from that particular mine. On this aspect of the case the agreement, clauses 2 and 7, merely emphasise the position, and show that the sub-lessor was fully aware of it. There is no evidence that the sub-lessor ever gave any directions as to grouping which were not complied with.

In 1933 ,however, disputes arose between the parties on the ground, apparently, that the tribute was not paid, and the sub-lessor aplied to the Warden of Mines (Mr. Harris) for cancellation of the sub-lease. The Warden of Mines on enquiring into the matter confined himself to the terms of the sub-lease, irrespective of any possible variation by the agreement. He found that the sub-lessor had failed to prove that he had not receievd the actual tribute payable in respect of tin-ore won from the land. Any failure to work on a large scale (clase 8(ii) of the sub-lease) he found to be due to the provisions of the Restriction Rules, and he decided that the failure to employ sufficient coolies was due to the Certificates of Production being grouped. The Warden of Mines, therefore, exercised his discretion under section 97(ii) of the Mining Enactment, and refused to cancel the sub-lease.

There were, however, further disputes, and litigation appears to have started on the construction of the agreement in Suit 487 of 1933. The suit was taken to the Court of Appeal, and a further appeal to the Privy Council was in contemplation when arbitrators were called in and the disputes were for the moment settled by the execution of an agreement of compromise in Chinese on the 16th October, 1934. This document was in the proceedings before the Warden of Mines which are the subject of the present appeal. I agree with the learned trial Judge that it is not easy to say what the effect of that document may be. It is not, however, necessary to decide this point. The only relevance of the agreement of the 11th October, 1932, and the Chinese document of the 16th October, 1934, is that the Warden of Mines took them into consideration in exercising his powers under section 97(ii).

Very soon after the execution of the deed of compromise further disputes arose between the parties. At this period Foo Nyit Tse seems to have been dead, and his interests in the sub-sub-lease had devolved upon the present appellants. From the correspondence subsequent to the document of the 16th October, 1934, it would appear that what the appellants really wanted was a transfer of a proportionate part of the quota, and not payment of the tribute in money or by the transfer of so many pikuls of ore (see letter of 11th December, 1934, and letter of 18th March, 1935). It is to be remarked that any arrangement for subdividing the quota can only be made with the consent of the Controller and there is no evidence that he was ever asked to make any such sub-diviison.

As the parties were unable to arrive at any agreement, on the 22nd July, 1935 the appellants lodged a complaint before the Warden of Mines, and these [283] proceedings were commenced. The [283] summons dated the 23rd July, 1935 alleged, as in the case of the complaint in 1933, that the respondent had failed to comply with clauses 8(i), 8(ii) and 8(iii) of the sub-lease. After hearing evidence the Warden of Mines (Mr. A. G. Macdonald) gave judgment on the 7th October, 1935. The Warden of Mines, like the previous Warden of Mines in 1933, found in favour of the respondent as regards the complaint under clause 8(i). Inferentially he also decided in the respondent's favour in respect of clause 8(ii). The gist of his judgment which reads:—

> "In this case I find that the defendant not only does not work the land, but does not pay the tribute due under the collateral agreements. I therefore see no good reason for exercising these discretionary powers, and order the sub-sub-lease No. 20/30 to be cancelled for breach of clause 8(iii) thereof."

The respondent thereupon appealed to Mr. Justice Howes who by order dated the 25th June, 1936 set aside the order for cancellation. Against this order the appellants have appealed to the Court of Appeal, with a view to restoring the order of the Warden of Mines.

Put shortly, the appellants' case is as follows:—

There has admittedly been a breach of clause 8(iii), as the mine was not being worked at all; thereupon a *prima facie* case for cancellation has arisen. In deciding whether or not to exercise his discretion the Warden of Mines is bound to look into all the surrounding circumstances, and in so doing quite rightly came to the conclusion that the respondent had committed breaches of the supplementary agreements, and that accordingly, there was no sufficient reason why the Warden of Mines should exercise his discretion in the respondent's favour.

To this argument the respondent had two replies:—

(1) the passing of the Tin and Tin-ore (Restriction) Enactment together with the rules made thereunder put into abeyance the powers of the Warden of Mines under section 97(ii), at all events in cases where certificates of production had been grouped with the permission of the Deputy Controller and all parties interested in the mine in question; and alternatively,

(2) if the Warden of Mines had any jurisdiction, he exercised his discretion on a wrong principle.

As regards (1) I find myself unable to accept Mr. Braddell's argument. It is true, of course, that as a result of restriction the exercise of the Warden's powers under section 97(ii) must necessarily be modified, but I do not think it necessary to find that his jurisdiction is entirely at an end. It is, for instance, quite possible to visualise a case in which, as a result of the grouping arrangement, the whole output was to be produced from one particular mine. It is true that the Warden can only adjudicate upon the particular sub-lease, and if the quota under the sub-lease was (say) 500 piculs for any quarter, the Warden could not take into consideration that by virtue of the grouping arrangement (say) 1,500 picults should be produced. But if in defiance of the arrangement the mine was not worked at all, I see no reason why complaint should not be made that the sub-lessee had failed to comply with the actual terms of his sub-lease. I hold, therefore, that although the jurisdiction of the Warden under section 97(ii) can only be exer-

cised with due regard to the subsequent legislation and the rules made thereunder, it would be going too far to say that such jurisdiction is entirely in abeyance.

As regards the alternative argument I think that this is well founded for the reasons stated by the learned trial Judge in the Court below. The manner in which the jurisdiction should be exercised is correctly stated in the judgment of Mr. Harris, Warden of Mines, upon the 1933 complaint (pp. 55 and 56 of the record). The position appears to be this: — the appellants' real grievance was that the respondent had not transferred a proportionate part of his quota. This could not directly be the subject of a complaint before the Warden of Mines, as he can only deal under clause 8(i) with a failure to pay the tribute reserved by the sub-sub-lease in respect of tin-ore produced from the mine. No tin-ore was in fact produced, and therefore, the exercise of the Warden's powers under clause 8(i) did not arise. The Warden's powers are strictly limited by statute. He has no jurisdiction to enquire into or interpret collateral agreements. He is confined to the terms of the sub-lease. Then, in considering clause 8(iii) the Warden first of all correctly ruled, as had the previous Warden, that a lease should not be cancelled for a breach of clause 8(iii), if such breach was purely due to the incidence of restriction. There can, I think, be no dispute that the failure to employ the 100 men required by the third clause was entirely due to the grouping of quota to which everyone has assented. This breach, therefore, did not in itself afford any justification for the cancellation of the sub-sub-lease. But the Warden of Mines did not stop there. He found, rightly or wrongly, a breach of certain collateral agreements upon which he had no jurisdiction to express an opinion. In exercising his discretion, therefore, he took into consideration matters which he had no jurisdiction to decide. This constitutes an improper exercise of the discretion vested in him by law, and cannot stand.

As mentioned by the trial Judge below, the appellants have their ordinary civil remedy against the respondent, if the latter has committed a breach of contract, but is not an issue which can be litigated before the Warden of Mines.

[284] [284] I would, accordingly, dismiss the appeal with costs. The deposit will be paid out to the respondent or his solicitor on account of his taxed costs.

Whitley Ag. C.J. (S.S.): I have had the advantage of reading the judgment of the learned President, and I agree that this appeal should be dismissed for the reasons which he has given. In my opinion, Mr. Braddell put the case for the respondent too high when he contended that the passing of the Tin and Tin-ore (Restriction) Enactment has in effect taken away from the Warden of Mines the jurisdiction which was given to him by section 97 of the Mining Enactment. His argument appeared to be based upon the view that that jurisdiction was given to the Warden to be exercised for the protection of the interests of the State, by ensuring that mining land is worked in such a way as to produce the maximum reasonable quantity of tin ore with consequent revenue to the State, and not to be exercised for the purpose of deciding disputes between individuals.

Whilst agreeing with him that it is to the advantage of the State that mining land should be properly worked, it appears to me clear that section 97(ii) is also designed to provide cheap and expeditious machinery whereby sub-lessors and sub-lessees may have their differences settled by an officer who, by reason of his experience, is pecularily well qualified to adjudicate upon such matters. It is true that the introduction of restriction has, by the creation of a system of quotas and provision for grouping, rendered the position much more complicated than it was when section 97(ii) was enacted, but I can envisage many simple cases in which the Warden might still properly be called upon to exercise his powers under the section, and it would, in my opinion, be most unfortunate for the mining community if it were to be thought that he no longer possesses those very useful powers. His discretion still remains to be exercised judicially in a proper case. But I agree that in the present case that discretion was not properly exercised. The jurisdiction given to him is a special limited jurisdiction which must be exercised in the way prescribed in the section and not otherwise. The section does not give him power to construe contracts made between the parties outside the terms of the sub-sub-lease, as he did in this case. If the parties wish to have the terms of such collateral agreements adjudicated upon, their proper remedy is by instituting civil proceedings.

I would accordingly dismiss the appeal, with costs.

Aitken J.: In this case I have had the advantage of reading the learned President's judgment, and find myself entirely in agreement with the conclusions at which he has arrived. In spite of the Tin and Tin-ore (Restriction) Enactment, and the Rules made thereunder, and the grouping of certificates of production, I am clearly of opinion that the Warden's discretionary power to cancel sub-leases (and sub-sub-leases) under and in accordance with section 97(ii) of the Mining Enactment still survives. It is obvious, however, that the ambit of his discretion under that sub-section has been very materially circumscribed by the subsequent legislation to which I have just referred. In this particular case, to put it bluntly, the real reason why the Warden cancelled the respondent's sub-sub-lease was not because of any breach of clause 8 thereof, but because he considered that the respondent had broken a collateral agreement between the parties under which the appellants claimed a transfer to them of a portion of the periodical quotas issued to respondent.

In doing so it seems to me that he exceeded the jurisdiction conferred upon him by the Mining Enactment, and took upon himself the burden of adjudicating upon different questions of law and fact which the legislature never intended him to decide.

I agree that this appeal should be dismissed, and with costs.

Appeal dismissed.